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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

Nos. 57, 58 AND 59

THE ASSOCIATED PRESS, PAUL BELLAMY, GEORGE FRANCIS BOOTH, ET AL., *Appellants,*

*vs.*

THE UNITED STATES OF AMERICA.

TRIBUNE COMPANY AND ROBERT RUTHERFORD McCORMICK, *Appellants.*

*vs.*

THE UNITED STATES OF AMERICA.

THE UNITED STATES OF AMERICA, *Appellant,*

*vs.*

THE ASSOCIATED PRESS, PAUL BELLAMY, GEORGE FRANCIS BOOTH, ET AL.

## Reply Memorandum of Tribune Company and Robert Rutherford McCormick on the Question of Summary Judgment.

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THE TWENTIETH CENTURY PRESS, INC., CHICAGO

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The government alone moved for summary judgment. None of defendants joined in such motion or filed cross-

*In this memorandum we consider only AP's by-laws imposing restrictions on admission to membership. For clarity and brevity we do not refer to the by-law relating to the exclusive return of local spontaneous news or to the Canadian Press contract each of which can be segregated from the membership by-laws by independent treatment and relief.

motions. As movant, the government undertook the burden of showing that it had established beyond dispute every material fact necessary to entitle it to a judgment as a matter of law (Rule of Civil Procedure 56(c)). The movant thereupon assumed the burden of establishing a principle of law and of establishing beyond genuine dispute all of the material facts necessary to make that principal applicable to this case.

**Civil Procedure Rule 56.**

The government filed interrogatories, requests for admission and affidavits in support of its motion. Under Rule 56 the facts contained in all of the evidence adduced by the government would have been undenied, hence admitted by the defendants, unless the defendants saw fit, as they did, to produce contradictory sworn testimony of witnesses knowing the facts. The defendants in this case produced such contradictory evidence. The facts so contradicted are in genuine dispute and cannot be considered on this motion.

No proffer of proof is necessary nor is it allowed. No opinion evidence for plaintiff is permissible because such evidence is not factual and not subjected to cross-examination (*Sartor* v. *Arkansas Natural Gas Corp.*, 321 U. S. 620; Gov. Brief p. 10). If opinion evidence is essential to the movant, the motion must be denied.

Any fact denied by the defendant's evidence must be excluded from consideration on the government's motion for summary judgment. The sole function of the court on summary motion is to ascertain if the undenied facts warrant entry of judgment.

These defendants contended below and in this Court that this case should not be decided on such a motion. The statements on pages 4 and 5 of the government's memorandum to the effect that these defendants did not raise this

issue below are misapprehensions. It is necessary to quote only one of the many statements in our brief in the district court on this question:

> "In determining the validity of any restraint, especially a restraint ancillary to a main lawful contract of purchase and sale, the situation of the parties, the subject-matter, the nature of the business restrained, the condition of the business before and after the imposition of the restraint, the nature of the restraint and its effect, actual and probable; likewise, the history of the restraint, the evil it is supposed to correct, the object to be obtained by it, are all relevant, 'not because good intention will save an otherwise illicit restraint but because knowledge of the facts and circumstances will aid the court in arriving at a conclusion'. Thornton, *Combinations in Restraint of Trade*, p. 339c, citing *Chamber of Commerce* v. *Federal Trade Commission*, 13 F. 2d 673, which in turn paraphrased Brandeis, J., in *Chicago Board of Trade* v. *U. S.*, 246 U. S. 231, 238 (1918); see also the *Sugar Institute* and *Corn Products* cases.
>
> This evidentiary principle, unquestioned and unquestionable, is sufficient alone to warrant the denial of this motion. To appraise such underlying and fundamental facts, the trier should see and hear the witnesses under direct and cross-examination."

This whole case turns on whether or not there are enough undenied, undisputed facts, which when integrated with a proposition of law, warrant judgment,—which defendants have always denied and still deny.

## The Five Principles of Law

The movant advanced four principles of law and claimed that the undisputed facts warranted recovery on each of them. The district court advanced a fifth. We were required therefore to examine those five principles of law and then to ascertain if the facts essential to each were or were not in genuine dispute.

**First Proposition: Monopolization of Trade and Commerce**

The government originally contended that AP has monoplized interstate commerce in news, information and intelligence (Compl. R. 2, Mo. Sun. Judg. R. 956, 958 *et seq.*). The government introduced a tremendous amount of evidence which, it contended, showed monopoly and indispensability. The defendants introduced a great volume of countervailing evidence, thus putting the matter in genuine dispute. In fact the countervailing evidence was so overwhelming that the district court held as conclusions of law that AP does not monopolize the furnishing of news reports, news pictures or features to newspapers in the United States (Law IX, R. 2629); access to the original sources of news (Law X. R. 2629) or the transmission facilities for the gathering or distribution of news reports, new pictures or features (Law XI, R. 2629). The government assigned error to conclusion IX but has abandoned the contention in this court (Gov. Memo. p. 13).

**Second Proposition: Boycott**

The government's second proposition of law is that "an agreement to exclude others from certain trade is a restraint prohibited by the Sherman Act"; that AP's by-law restrictions on admission to membership constitute such an agreement to exclude others. The government here uses the word "exclude" in the sense of "boycott" (R. 965).

The material undisputed facts on this issue are the membership by-laws themselves. They do not constitute a boycott (Our Brief pp. 30-35). They fall instead within the class of agreements, well defined and universally held lawful in all industries, for territorial exclusivity ancillary to a main contract of purchase and sale and no broader than necessary to protect that which the purchaser obtained in the main contract.

Under the AP by-laws, if the owner of a newspaper not in the field and city of a member files an application for membership, such application is passed on by AP's directors. They determine whether AP will enter into a contract with the applicant. If the board decides to enter into a contract, the transaction is completed by the applicant signing the roll of members and agreeing to abide by the AP by-laws, such by-laws constituting the contract. The determination by the directors to admit or not to admit to membership (i.e to enter or not to enter into a contract) is not boycott or exclusion; it is the same determination made by any producer in the unrestricted selection of his customers.

Under this contract the new member agrees:

1. To publish AP's news dispatches regularly without garbling;
2. To pay for AP's services in the form of assessments;
3. To publish AP's news dispatches in the field (morning, evening or Sunday) and city wherein the member publishes his newspaper.

AP agrees

1. To furnish the new member daily with AP's news dispatches;

2. Not to furnish its dispatches to any other newspaper in his city and field, save upon certain conditions.

The defendants adduced evidence,—which must be taken as true on motion for summary judgment—that this contract for territorial exclusivity in the arena of news agencies and newspapers is not unreasonable:

*First:* AP's by-laws do not exclude (in the sense of "boycott") any person from obtaining AP news dispatches. They merely protect a present purchaser in the enjoyment of that which he has purchased in the very limited field and city in which he publishes his newspaper.

*Second:* Industries generally enter into covenants granting territorial exclusivity and such covenants have uniformly been held licit.

*Third:* The restraint is almost universally used in all phases of the news industry by agencies and newspapers alike.

*Fourth:* AP's covenant for territorial exclusivity is vertical even if, as the government contends, it is supported by the horizontal agreement of all of the members of AP. The covenant runs from AP to the customer-member. It in no way differs from the similar covenants used by UP, INS, International Harvester, Mutual Broadcasting Company and others.

*Fifth:* AP's covenant for territorial exclusivity is neither enlarged nor made more restrictive even if, as the government contends, it is supported by the horizontal agreement of all of the members of AP. The covenant is still no broader than the main valid contract and protects the customer-member in the enjoyment of that which he has contracted to purchase from AP as long as that contract exists.

We submit, therefore, that even if this case involved ordinary fungible goods, the relevant material facts are wholly adverse to the government's proposition of law and required denial of the motion on this issue.

*The fact that the subject of the covenant in this case is an intellectual product protected by the shield of the First Amendment is an added and powerful material fact compelling denial of the motion* (Our Brief p. 43 et seq.; see also the briefs *amicus curiae*).

The government in its brief does not deny that these are the material facts on this issue. Rather it attempts to avoid by citing a great number of boycott cases which are not in point (Our Brief p. 30 et seq.) and by asserting that although the doctrine of ancillary covenants for territorial

exclusivity is not objectionable in the abstract, the doctrine does not apply in this case for other reasons, which are the government's other propositions of law hereinafter analyzed.

**Third Proposition: Restraint of Trade.**

The third proposition advanced by the government is that an agreement which restrains trade violates the Sherman Act; that AP's by-laws imposing conditions on admission to membership constitute an agreement which so restrains trade (Compl. R. 2; Mo. Sum. Judg. R. 956, 958 et seq.). The test of legality under this proposition is whether the agreement unreasonably or unduly restrains, restricts, hampers or impedes competition or trade under common law concepts (Our Brief p. 4).

The government's burden with respect to this proposition then was to adduce facts, not denied or disputed, which would show that AP's ancillary covenant granting qualified territorial exclusivity to its customer-members had an unreasonable or undue impact on competitive agencies and non-AP newspapers. This the movant did not do. Such covenant should have been held reasonable and licit as soon as the district court found Fact 70 (R. 2616; referred to in Gov. Memo. p. 9)

> "The growth of news agencies has been fostered to some extent as a result of the restrictions of The Associated Press' service to its own members, but other restrictions imposed by The Associated Press have hampered and impeded the growth of competing news agencies and of newspapers competitive with members of The Associated Press"*

*We assigned error to this finding (Assign. 10, R. 2649, 2650) because the undisputed evidence does not show that the "other restrictions"—presumably the by-law requiring exclusive return of local spontaneous news and the Canadian Press contract—have hampered or impeded trade to any degree. The district court in holding these "other restrictions" independently valid necessarily held that the "hampering or impeding" was not unreasonable.

and was unable to find, and did not find, that the other restrictions hampered or impeded trade to an *undue extent*. The district court well knew and pointed out the difference between a restraint of trade, which is perfectly legal, and an *undue or unreasonable* restraint, which is illegal (Opinion Rec. 2588, fol. 3155); between hampering and impeding and *unduly* or *unreasonably* hampering and impeding (Our Br. p. 4).

Defendants' counter evidence shows that AP's membership restrictions have contributed to the formation and growth of competitive agencies (Our Br. pp. 12-14; 22-23). It shows that such covenants have not unduly restrained, if they have restrained in any degree, the trade of non-AP newspapers (Our Br. pp. 14-18; 23-24).

**Fourth Proposition: Collective Action Which Results in A "Competitive" or "Trade" Advantage is a Violation of the Sherman Act Unless the Advantage is Shared With Competitors.**

We deny that this fourth proposition (Gov. Br. pp. 81 to 89) states a sound principle of law. As we stated in our reply brief (pp. 12 and 13) the proposition is wholly divorced from size, dominance or monopolization; from any factor of indispensability, and from the commission of any predatory acts such as driving or excluding a competitor from the trade or from any segment or part of the trade. We therein pointed out also that this proposition permits UP, INS and other non-mutual agencies to sell under covenants for territorial exclusivity and therefore disenables mutual associations from competing on even terms with such commercial services.

The proposition is so fallacious that the government has unthinkingly contradicted it in its present memorandum. At page 9 it contends that denial of AP service "is a *substantial* competitive handicap." "Substantial" presumably means unreasonable or undue. This brings us back to the question of whether the membership restraints unreasonably restrain competition, discussed above.

Assuming the proposition to be valid, however, is the test of "competitive advantage" subjective or objective? Is it sufficient, as the government contends (Memo. p. 8) that a publisher merely "desires" AP service? Or must the government show as material facts that denial of AP service actually handicaps the trade of a non-AP newspaper?

If the objective test is the proper one, the evidence is in genuine dispute. There is a dispute as to whether UP service is better than AP's or vice versa. Many newspapers have succeeded with UP and INS and many using those services successfully compete with AP newspapers in the same city and field. Many newspapers have given up AP and subscribed to UP. It is not necessary for a newspaper to have two or more of the major services to be successful. This defendant has used AP service, of the three major services, almost exclusively for nearly one hundred years. There is no undisputed evidence that a newspaper already subscribing to UP or INS will objectively be advantaged by incurring the cost of and the expense of handling AP; this seems to depend upon opinion evidence (R. 1311).

If the test is subjective, namely, the desire of some publisher for AP service, the factor of "trade or competitive advantage" is cancelled out of the proposition: The proposition should then be reworded; It is unlawful

for a cooperative to grant territorial exclusivity to those with whom it contracts if anyone else in that field desires the service!

**Fifth Proposition: "Full Illumination".**

The last proposition of law advanced in support of the motion is the one advanced by the district court in its opinion: there is a paramount public interest in "the dissemination of news from as many different sources and with as many different facets and colors as is possible"; AP's membership by-laws restrain, to some degree, such dissemination and are therefore invalid under the Sherman Act.

We deny the soundness of this proposition of law. The Sherman Act, we believe, was designed solely to protect the public interest in "free competition in the market". We believe that the court's holding that the defendants had not monopolized trade and its inability to find that the defendants had unreasonably restrained trade exhausted the court's jurisdiction to inquire into "public interest" and that it should have forthwith denied the motion for summary judgment (Our Br. pp. 35-36).

Assuming, *arguendo*, however, that the proposition of law is a proper test in a Sherman Act case, then the conclusion that AP's ancillary covenants granting territorial exclusivity restrain in any degree the dissemination of news finds no support in the record. Complete evidence, most of which could only be adduced on trial and which should be subject to cross-examination, is essential to a determination of this issue.

We have set forth in our main brief (pp. 36-41) some of the evidence which would be necessary and relevant such as:

1. The effect of territorial exclusivity in the past on the formation and growth of competitive agencies with

expert opinion of the effect of outlawing such restraints in the future.

2. The effect of abolishing the restraints on AP. There is evidence to the effect that it will result in the prompt expansion of the membership of AP, perhaps to the point of sole occupancy of the field. The government says, however, such opinion evidence may not be considered on motion for summary judgment.

3. The effect on UP and INS. Will newspapers flock to AP and forsake UP and INS?

4. The effect on smaller agencies. One conclusion seems clear: Prohibiting the restraints will stop the growth of the twenty to thirty smaller "substantial" agencies. It may cause their abandonment.

5. The effect on newspapers. If the principle applies to all agencies "of first rating," can the medium-sized and small newspapers afford the luxury of more than one major service? If they cannot, will they take only AP?

The foregoing is sufficient to show that this issue of "full illumination" could not possibly be determined on this motion for summary judgment.

There is really only one issue in this case: Do AP's membership by-laws unreasonably restrain trade? The material undisputed facts of record at this time show they do not. The district court therefore should have denied the motion.

In addition, we submit that the court would have been justified in dismissing the complaint since such covenants for territorial exclusivity have been uniformly held reasonable and lawful under the common law, state anti-trust statutes and the Sherman Act.

The foregoing treats AP's services as goods, wares and merchandise. The defendants are entitled at the least

to as favorable treatment as is meted out to purveyors of such. But AP dispenses the products of the mind and is entitled not only to the protection of the due process clause of the Fifth Amendment but also to the press and speech clause of the First Amendment. Under the government's cooperative theory, AP alone among news agencies will be compelled to utter to those who apply. Under the full illumination theory of the district court, all news agencies will be under compulsion to utter to those who apply. Under the government's restraint of trade theory, all news agencies will likewise be compelled to utter to those who apply. The government in oral argument boldly stated that it would be satisfied with no relief unless AP be compelled to serve the two rejected applicants. But under no theory—whatever it may be—may any individual or group of individuals be compelled to utter to 2, 10 or to any person to whom he or it wishes not to utter, save when there is "clear and present danger" to our institutions (Our Brief p. 52-54). There can be no violation of the anti-trust laws predicated on the duty of defendants to utter when they would remain silent save in cases of "clear and present danger."

Respectfully submitted,

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